SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 630

THE BARRETT LINE, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND MISSISSIPPI VALLEY BARGE LINE CO., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

APPELLANT'S REPLY TO MOTION TO AFFIRM

CHARLES H. STEPHENS, JR.,
ROBERT E. QUIRK,
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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil No. 881

THE BARRETT LINE, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

REPLY OF APPELLANT TO MOTION TO AFFIRM

Filed October 13, 1944

Preliminary Statement

The defendants, the United States of America and the Interstate Commerce Commission, have filed a motion to affirm the decree of the lower court herein entered July 28, 1944. This reply for appellant is in opposition to that motion. In that decree the court sustained an order of the Interstate Commerce Commission, Division 4, entered June 18, 1943, in the *Barrett Line Case*, 250 I. C. C. 809, and dismissed the complaint. In its *Per Curiam* decision the court below held that the Commission had not misconstrued

or misapplied the applicable statute and had not acted arbitrarily in declining to issue a permit to the appellant to operate as a contract carrier by water. However, that decision does not reveal the court's reasoning or the grounds on which its action was taken.

The Essential Facts

The appellant is a contract carrier by water, which has been operating as such on the Ohio and Mississippi Rivers and their tributaries for four generations. It seasonably filed an application with the Commission for a permit under provisions of section 309 (f), which is the so-called "grandfather" provision, and section 309 (g), which deals with applications for permits to establish new operations. These applications were consolidated and were disposed of by the Commission on one record. The permits sought by the appellant were opposed by the Mississippi Valley Barge Line Company and certain other common carriers by water who operate over the Ohio and the other rivers.

The appellant performs a towboat service and a barge service. It performs a freighting service on its own barges and a tow business on barges owned by others. In addition, it does a chartering business that contemplates the handling of both freight and the supplying of equipment to persons doing chartering, and also contemplates towing on a per diem basis.

During the period covered by the record before the Commission, appellant was engaged in chartering its vessels and in the transportation of petroleum products in bulk. However, as Exhibit 1 in the record before the Commission shows, during the years 1936 to and including August 1942, appellant engaged in 23 chartering transactions under which it leased or chartered its equipment to various shippers, none of whom are carriers subject to the Interstate

Commerce Act. During the same period, it engaged in 21 transactions under which it leased or chartered its equipment to carriers subject to the Interstate Commerce Act.

At the time of the hearing, appellant owned two tow or tug boats and 21 barges. Its barges, which are steel, were originally designed with the idea that they could be converted so as to transport liquid cargo. The testimony shows that the barges can be reconverted on comparatively short notice, so as to be fitted to transport general cargo.

A copy of appellant's tariff is attached to the bill of complaint. This tariff, which was filed with the Commission and published in the manner required by the Commission's rules and regulations governing such matter, contains the minimum charges of appellant. The tariff provides that appellant will contract to transport all commodities in barges in lots of not less than 500 net tons.

At the time of the hearing before the Interstate Commerce Commission, it was shown that the appellant's assets amounted to $935,123.56. Of the total assets about $280,000.00 are liquid, which means that appellant will be able when the occasion requires to change its equipment, or acquire additional equipment, to enable it to reengage in the transportation of general cargo as a contract carrier. Until the present war emergency ends, it is quite evident that it not only would be contrary to the public interest for the appellant to discontinue the transportation of gasoline and other petroleum products in its barges, but, in all probability, appellant would not be permitted to do so.

Appellant's operations are special in the highest degree. It serves customers under special contracts, and the river landings as the occasion requires. It is an irregular operator of river craft. In the experience of appellant and its predecessors there have always been elapsed periods of inactivity between the consummation of one contract or

trade and the engagement of another. There have been long periods in which one trade has practically absorbed the activities of appellant, such as, for example, its present activity in the transportation of petroleum, which is certainly a real contribution to the war emergency. The testimony before the Commission shows that appellant has handled a wide variety of commodities at various times, such as, for example, scrap iron, pig iron, fabricated steel, pipe, steel piling, sulphur, stone, petroleum products, bauxite ore and automobiles. It pioneered the movement of automobiles and many other commodities by water.

The Examiner of the Commission who heard the evidence served a report in which he recommended that a permit be granted the appellant under the provisions of section 309 (f) of the Interstate Commerce Act. Division 4, of the Commission, reversed the Examiner, and held that the appellant was not entitled to a permit either under the "grandfather" provisions of section 309 (f), or a permit to establish new operations under section 309 (g).

The Pertinent Statutory Provisions and the Decision of the Commission

Section 309 (f) of the Interstate Commerce Act provides that no person shall engage in the business of a contract carrier by water unless he holds an effective permit issued by the Commission, except that if any such carrier

> "was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which the application is made, and has so operated since that time * * * the Commission shall issue such permit, without further proceedings * * * if application for such a permit is seasonably filed."

Section 302 (e) defines the term "contract carrier by water" as follows:

> "The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.
>
> The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.'"

It will be observed that neither section 309 (f), nor section 302 (e) provides that a contract carrier by water must have been engaged in the transportation of non-exempt cargo on the "grandfather" date. In each case, the qualifying test appears to be that the carrier was engaged in bona fide operation as a contract carrier in "interstate or foreign commerce for compensation." Appellant was so engaged. It will also be observed that the Act does not regulate the business of chartering boats, as such. It provides that the furnishing of a vessel for compensation under a charter, lease, or other agreement, to a person other than a carrier subject to the Act, "when such vessels are used by the person in the transportation of its own property, shall be considered as engaging in transportation for compensation by the person furnishing the vessel within the meaning of the phrase 'contract carrier by water.'"

Section 309 (g) provides that where an application is

properly filed with the Commission for a permit to operate as a contract carrier by water

> "the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part * * * and that such operation will be consistent with the public interest and the national transportation policy declared in this Act."

That section also provides that

> "the business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part or those lawfully established by the Commission pursuant thereto:"

Section 303 (b) of the Act provides:

> "Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities * * *."

Because on or about the "grandfather" date, and since that time, the appellant has been engaged, except for its chartering transactions, in the transportation of petroleum products in bulk, which transportation is exempt under section 303 (b), the Commission concluded that appellant had failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to Part III of the Act. The Commission stated that the only transportation which might be subject to regulation under Part III was that of chartering vessels to shippers by appellant. As to these transactions,

the Commission said that no showing was made as to the nature of the services rendered, the commodities carried, or the points served with such vessels, and that on the showing made the Commission would not be warranted in finding that the appellant on January 1, 1940, and since, was engaged in chartering operations subject to Part III.

In dealing with the chartering transactions of appellant during the critical period, the Commission not only misconceived and misapplied section 309 (g) and section 302 (e) of the Interstate Commerce Act, but also reached a conclusion which is in direct conflict with the decision of the entire Commission of January 4, 1944, on reargument in the *C. F. Harms Company Case*, 260 I. C. C. 171. In the latter decision the Commission reversed the decision of Division 4, which had construed the applicable sections of the Act in the same manner as the Commission construed them, against appellant in the instant case. The question in the *Harms Case* as to charter transactions, as here, was whether where the owner of a vessel leases or charters a vessel to a shipper, the owner must show the nature of the service rendered, the commodities carried, and the points served with such vessels by the lessee. It is at once obvious that the owner is in no position to make such a showing as only the lessee has this knowledge. In the instant case, and in its first decision in the *Harms Case*, the Commission held that the lessor of the vessel must make such a showing before entitled to a permit. In its final decision on reargument in the *Harms Case*, 260 I. C. C. 171, the Commission reversed that conclusion and made the following cogent statement apropos of the question:

> "It is conceded that the construction placed upon Section 309 (g) by the Division is proper when applied to carriers who for themselves determine the extent of their operations and the services they will render or the 'scope thereof.' Applicant argues that the

rights of a carrier under the 'grandfather' clause of the statute must be determined by what it does in bona fide operation, and that such rights are not enlarged or otherwise affected by what others, independent of the carrier, may or may not do. That construction and application of the statute assures the carriers a certificate or permit to continue its operations as maintained on the statutory date and continuously since. Applicant on January 1, 1940, and continuously since, has held itself out to hire its vessels to anyone for any use for which they were suited without limitation as to the commodities to be transported or the place or places to which they were to be moved. It claims, therefore, that the permit to which it is entitled under the so-called 'grandfather' clause of the statute would permit it to continue the carrier business in which it was engaged on and since the statutory date. It further claims that the limiting of its permit to defined territory base upon the use to which the hirer of its vessels used them on and since the statutory date restricts its business materially and prevents it from continuing the operations in which it was engaged and in which it continuously has been engaged. We conclude that the claims of applicant are well grounded. The territorial limitations imposed by the permit issued April 14, 1943, are not warranted and should be removed."

The final decision of the Commission in the *Harms Case* on reconsideration is in accordance with the letter and the spirit of the applicable statute. The decision here assailed is otherwise. It should be kept in mind that under section 302 (c) of the Interstate Commerce Act chartering transactions constitute as to the vessels leased or chartered "engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'." It will thus be seen that as the appellant engaged in 23 chartering transactions under which it leased or chartered its vessels to various shippers, none of whom are carriers, before, on and

after the "grandfather" date, January 1, 1940, it must be held to have been engaged in transportation for compensation as a contract carrier by water, and as such it is entitled to a permit from the Commission under section 309 (f).

So much for the chartering transactions. As to its freighting service, namely the transportation of freight on its own barges, the appellant, as heretofore stated, was engaged principally in the transportation of petroleum products in bulk. This character of transportation, standing alone, is exempt from the provisions of Part III of the Interstate Commerce Act by virtue of section 303 (b) of that part. Thus during the critical period the appellant was engaged in exempt and non-exempt transportation. In the *Russell Bros. Towing Case*, 250 I. C. C. 429, Russell Bros. were engaged in both exempt and non-exempt transportation during the critical period. In that case, after referring to the fact that neither section 309 (f), the "grandfather" clause, or section 302 (e), the definitive clause, contain any reference as to whether the transportation performed by the carrier is or is not subject to regulation, the Commission said:

> "In determining a carrier's status and the scope of its operations during the 'grandfather' period its entire operation should be considered, and not merely that part which the Congress has seen fit to make subject to regulation. To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires the reading into the law of language which, in fact, is not there.
>
> "This matter is particularly important in instances like the present where an applicant is seeking a certificate covering all commodities, or general cargo. *Obviously no carrier actually transports all commodities and therefore the bona fides of an applicant's operations depends* on the *representative character* of the transportation performed. It may well be that the car-

rier holds itself out to, and actually does, transport all traffic offered to it from and to all points covered by its application but that the great bulk of such transportation is exempt from regulation. It seems clear that if we shut our eyes to all of applicant's transportation except that which is subject to regulation *we get an incomplete and distorted* picture of the *nature and extent of its operations.* To place limitations upon 'grandfather' rights, predicated upon that view would be unjust and unreasonable, and is not contemplated by the law."

In the decision of the entire Commission of July 26, 1944, Docket W-12, in the *Moran Towing and Transportation Company case*, not yet reported, the Commission authorized the issuance of a certificate to Moran, who was engaged in towing service, even though all of such towing services performed during the critical period were exempt under the provisions of the Interstate Commerce Act. In that case the Commission said that if it should deny the certificate sought, the applicant would no longer be able to hold itself out to perform an unlimited general towing service to the public, but would be required to confine its services to exempted operations. That is precisely the effect of the decision of the Commission in the instant case in denying appellant a permit. Under the decision assailed here the appellant would have to incur the expense and suffer the delay incident to obtaining a permit from the Commission in every instance where a new transaction involved non-exempt transportation. It is impossible for any water carrier to operate under such conditions, unless it elects to limit its operations to exempt operations.

In their motion to affirm the appellees point out that section 309 (g) requires the Commission in granting a permit to a contract carrier to specify in the permit the business of the carrier and the scope thereof, and they refer

to the decision of this Court in *Noble* v. *United States*, 319 U. S. 88, 92 as supporting the position taken by them. In that case the Commission limited the business of the motor carrier to the types of shippers it had done business with on the critical date, under the provisions of section 209, which in the respects here pertinent, are the same as the provisions of section 309 (g). There, Noble argued that, once the territory he may serve and the commodities he may haul have been determined, he should be allowed to haul these commodities for anyone he chooses within such territory limits. As on the critical date, Noble had exclusively served food canneries or meat packing houses, the court held that to grant the rights sought would make a basic alteration in the characteristics of the enterprise of the contract carrier, and that in such circumstances the "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the system beyond the pattern which it had acquired on the "grandfather" date. In the instant case, the appellant has not sought a permit from the Commission which would make a basic alteration in its characteristics. On the contrary, the permit sought would merely authorize appellant to continue to perform the character of transportation transactions it and its predecessors have performed for four generations. The facts here are more analogous to the facts in the *Lee Wilson and Company Case*, 29 M. C. C. 525, where the Commission authorized the contract carrier to transport commodities generally.

It is clear that in denying the appellant a permit under the "grandfather" provisions of section 309 (f) the Commission acted arbitrarily and misconceived and misapplied the law.

We shall now deal with the action of the Commission in denying appellant a permit to establish future operations

as a contract carrier by water. As already stated, the examiner properly concluded that appellant was entitled to such a permit. Division 4 reversed the examiner in this respect. The examiner's views on this question are summed up in the following paragraphs from his report and conclusion:

> "In determining these various matters it is appropriate to take a much broader view of the situation than in connection with the determination of 'grandfather' rights. Where applicant is and has been engaged in business similar to that for which the permit is sought, consideration may and should be given to its historical background, to the character of service rendered with respect to both regulated and unregulated traffic, and to the territory served, during whatever period information is available with respect to such matters.
>
> "The nature and extent of applicant's operations at present, and extending back over a long period of years, coupled with the evidence of record showing that it desires to continue such operations and has sufficient facilities and financial resources to do so, warrant the conclusion that applicant is fit, willing, and able to perform the service proposed."

In dealing with this phase of the case, Division 4 concluded, *inter alia*,

> "On this record we conclude that applicant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity requires such operation."

Division 4 also called attention to the fact that most of appellant's equipment is being used in the transportation of bulk petroleum products. Although the Commission recognized that the present petroleum movement is an emer-

gency operation occasioned by the war, that considering appellant's normal operations for a period of approximately five years before the war does not demonstrate that its operation consisted of other than performing exempt transportation. In this respect the Commission committed two errors. It failed to take into account that during the years from 1936 to and including August, 1942, to the date of the hearing, the appellant made 21 chartering transactions, which are non-exempt transactions and within the provisions of the Interstate Commerce Act. It also arbitrarily disregarded and gave no probative weight to the oral testimony of O. Slack Barrett, president of the appellant, which is to the effect that the appellant is fit, willing, and able, before or at the end of the existing war emergency, to engage in the kind of general cargo transportation transactions which it has performed for a long period of time. Under section 309 (g) it is the duty of the Commission to issue a permit to water carrier applicant if it finds that the applicant is fit, willing, and able properly to perform the service proposed

> "and that such operation will be consistent with the public interest and the national transportation policy declared in this Act."

In the *Scott Bros. Case*, 2 M. C. C. 155, 164, the Commission had occasion to construe and apply a similar phrase used in section 209 (b) of Part II. The Commission said, after considering the various decisions which threw light on that question:

> "It follows from this use that its true meaning is that of 'not contradictory or hostile to the public interest.' Such decisions as we have been able to find, support this interpretation of the phrase."

It requires a strained and unreasonable interpretation of the law to justify the conclusion of the Commission that the continued operation of a water carrier, which has used the Ohio and Mississippi Rivers and their tributaries for four generations, in chartering and other transportation transactions, could or would be hostile to the public interest or, otherwise expressed, would not be consistent with the public interest and the national transportation policy. The examiner properly gave weight to these facts. Division 4 disregarded them. In numerous decisions the Commission has held that the operation of a water carrier for a long period of time is practically conclusive evidence of the fact that its continued operation is required by the present and future public convenience and necessity. It has held that if it should decide otherwise it would not be following the direction of the national transportation policy of the Act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. *John L. Goss Corp.*, 250 I. C. C. 101, 103; *Choctaw Transportation Co.*, 250 I. C. C. 106, 107; *Roidville Oil & Guano Co.*, 250 I. C. C. 71, 73.

In the *John L. Goss Corp. Case*, the Commission said apropos of this question:

> "Applicant's operation as a water carrier for fifty years is evidence of the fact that continuation of the operation is required by present and future public convenience and necessity. If we were to decide otherwise, we would not be following the direction of the national transportation policy of the act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of national defense."

In refusing to grant appellant a permit to establish new operations, the Commission acted arbitrarily and unreason-

ably and, to use its own language, in doing so it failed to follow the direction of the national transportation policy. It also misconceived and misapplied section 309 (g) in denying appellant such a permit.

Conclusion

The effect of the Commission's decision, if sustained, will be to cause appellant irreparable injury. Without a permit to continue to handle general cargo and to engage in chartering transactions appellant will not be in a position to make contracts of that character until and unless, in each instance, it files an appropriate application with the Commission and obtains a permit. This involves expense and delays. This decision denies to appellant the right to continue to perform the character of service it and its predecessors have performed for 100 years.

It cannot be assumed that in enacting Part III of the Interstate Commerce Act, Congress meant to destroy a water carrier of this type. On the contrary, one of the principal purposes of that Act is to encourage, foster, develop, and promote transportation by water in all of its forms. The hearing before the committees of Congress were extensive. Congress knew that water carrier transportation had been conducted under a variety of special and unusual circumstances unknown to transportation by rail and by highway. The decision of the Commission here assailed will defeat these purposes. The effect of that decision will be to place in a preferred position the Mississippi Valley Barge Line and other large common carriers by water, since they will be able to handle both exempt and nonexempt traffic to the extent their equipment will permit, while carriers such as the appellant will be restricted to the transportation of exempt traffic.

The question here presented is one of substance. The motion to affirm should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served a copy of this reply to the motion to affirm upon counsel of record on this 11th day of October, 1944, by mailing them a copy thereof.

(S.) ROBERT E. QUIRK.